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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 615

ARO CORPORATION,

Petitioner,

vs.

CARL D. CITRON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner,

vs.

CARL D. CITRON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 11, 1967.

CITATIONS TO OPINIONS BELOW.

This was a civil jury case originating in the District Court for the Western District of Pennsylvania. The District Court opinion is included in the Appendix together with the jury verdict consisting of responses by the jury to special interrogatories. The opinion of the Court of Appeals and judgment was rendered and entered May 11, 1967. A copy of the Opinion of the Court of Appeals appears in the Appendix and is reported at 377 F. 2d 750 (1967). Petitioner's petition for a rehearing was denied by the Court of Appeals on June 16, 1967 without opinion.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

1. Does the conduct of a protracted civil jury trial in accordance with procedures recommended by the Judicial Conference of the United States, which recommendations to the District Courts include provisions for the scheduling of "long recesses . . . [in] the time period between the end of plaintiff's case in chief and the beginning of defendant's case," *presumptively* deny a civil litigant his constitutional right to trial by jury and/or due process and call for reversal of a judgment based on a jury verdict solely on the basis of recesses during the trial, not objected to by either party, in the absence of proof by the successful litigant that the recesses, particularly an eleven day recess ordered by the judge for his "own accommodation," were "imperative" under the "exigencies" of the case?

CONSTITUTIONAL PROVISIONS, STATUTES, AND JUDICIAL CONFERENCE RECOMMENDED RULE INVOLVED.

AMENDMENT V of the Constitution of the United States:

> ". . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

AMENDMENT VII of the Constitution of the United States:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

28 U. S. C. § 331:

"JUDICIAL CONFERENCE OF THE UNITED STATES.

* * * * *

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law. * * *"

RECOMMENDED RULES FOR THE TRIAL OF PROTRACTED CASES, Part IV, E-1:

"The court, in consultation with counsel, should decide on a trial schedule and include in the definitive pretrial order the following provisions: the court hours for each day of trial; the days each week when trial will be held; and the number of days for anticipated long recesses, especially the time period between the end of plaintiff's case in chief and the beginning of defendant's case." 25 F. R. D. 409.

28 U. S. C. § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61, Fed. R. Civ. P.:

> "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Supreme Court Rule 19.1(b:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: (b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this court's power of supervision."

STATEMENT.

As assignee of one David Roth, Respondent, Citron, the plaintiff in the trial court, sued Petitioner, Aro Corporation, alleging (1) breach of a confidential relationship and unlawful conversion of a trade secret, the subject matter of which was an air powered instrument for use in surgery; (2) conspiracy to violate certain fiduciary obligations owed to assignor by reason of an agreement among third parties; and (3) fraud in the prosecution of a patent application covering the said air powered surgical instrument.

The complaint in this case was filed on July 24, 1963. Six days thereafter the trial judge entered an Order (App. p. 29) directing that the case was to proceed pursuant to the procedures outlined in the *Handbook of Recommended Procedures for the Trial of Protracted Cases,* 25 F. R. D. 351, unanimously adopted by the Judicial Conference of the United States in March 1960.[1] Pursuant

1. The historical background and purpose of the Recommended Procedures are set forth in the Foreword to the Handbook written by Chief Judge Alfred P. Murrah, Chairman of the Judicial Conference Study Group on Pretrial Procedure in Protracted Litigation:

> "Recognizing the importance of the great reservoir of experience in the conduct of protracted litigation accumulated over the years and lying dormant within the legal profession, the Judicial Conference of the United States, in September 1955, authorized Chief Justice Earl Warren to commission a special panel of federal judges who, under the auspices of the Pretrial Committee of the Judicial Conference and in consultation with leading trial counsel, were to undertake a special study of the pretrial organization and trial of long and complicated civil and criminal litigation in the United States district courts. Three years of intensive investigation and deliberation and a careful marshalling of experience by the Study Group have culminated in this Handbook of Recommended Procedures for the Trial of Protracted Cases." (25 F. R. D. at 351).

thereto, the trial schedule was developed and tentatively agreed upon prior to the trial of the case. The schedule was modified and reiterated at various times prior to and during the course of the trial. No objections to the trial schedule were made by either party at any time until after the jury had rendered its verdict (in the form of responses to 16 special interrogatories) in favor of the defendant on all issues litigated. At this point Plaintiff raised the issue of prejudice resulting from the various trial recesses.

In all, the trial covered a period from January 27 through May 4, 1965, which encompasses a total of 69 trial days. Thirty-two trial days[2] were devoted to the parties' presentation of evidence to the jury; 14 days were devoted to *scheduled* recesses, including a recess of 11 days, exclusive of Saturdays and Sundays, ordered *sua sponte* by the trial judge and for his own accommodation (App. p. 30) *following presentation of Plaintiff's case in chief;* 5 days to hearings on jury instructions; and 4 days for closing arguments. The jury deliberated two days and the verdict was entered on the final day of trial. The remainder of the time was taken up by unscheduled recesses of short duration.

The District Court entered judgment in favor of petitioner-defendant on the jury's answers to 16 special interrogatories. (App. pp. 26-27.) The jury accompanied its answers to interrogatories with a letter explaining its reasoning. (App. p. 28.)

On appeal the Court reversed the judgment resulting from the jury verdict solely on the ground that the scheduling of trial recesses in the protracted litigation presumptively prejudiced plaintiff's right to due process and to

2. Of the 32 days, Plaintiff's presentation required 13 days and Defendant's presentation required 19. However, Plaintiff used about 9 days of Defendant's time for cross-examination and thereby substantially presented his case a second time.

effective trial by jury,[3] in the absence of proof that the prolonged recesses were "imperative" under the "exigencies" of the case. (App. p. 17.) The Court held that "a demonstration of prejudice was not required" (App. p. 18), since prejudice was "within the range of possibility."

Petitioner-defendant petitioned the Court of Appeals for a rehearing on its decision, which, among other things, sought a declaration of guidelines for the conduct of future protracted litigation—including the retrial of the instant case—in light of the Judicial Conference's Recommended Rules. The petition for rehearing was denied, without opinion, on June 16, 1967.

JURISDICTION OF THE DISTRICT COURT.

The jurisdiction of the District Court was based on 28 U. S. C. § 1332(a)(1).

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3. The Court's reasoning in finding presumptive prejudice was as follows:

(1) that plaintiff is at a tactical disadvantage in a trial by being required to present evidence before defendant;

(2) recesses during trial and especially following plaintiff's presentation of evidence further handicap the plaintiff by prolonging the trial thereby resulting in an unrevivable grasp of plaintiff's testimony by the jury;

(3) such procedure is error affecting the substantial rights of the plaintiff, with prejudice to plaintiff being within the "range of possibility;" and

(4) the trial record as a whole did not affirmatively show that the procedure was not prejudicial.

ARGUMENT.

The issue of the present case is directed primarily to the propriety of granting recesses during the course of a protracted civil jury trial as apparently suggested and condoned by the Judicial Conference's Recommended Rules for The Trial of Protracted Cases.

The primary issue is important because of the increasing number of so-called protracted cases and because few judges, with heavy judicial and civic responsibilities, can hope to schedule multi-month trials without making provision for some recesses for their "own accommodation." Whether these judge-initiated recesses can ever be "imperative" in the "exigencies" of the case is a question apparently answered in the negative by the Third Circuit.

A necessary corollary to the above query, however, is the issue of whether an after-the-jury-verdict allegation of prejudice resulting from the scheduling of trial recesses, absent affirmative proof of any prejudice, is sufficient, as a matter of law, in view of the Seventh Amendment, to permit an appeals court to deny a successful litigant the benefit of a jury's verdict (specific detailed answers to 16 special interrogatories) merely because "prejudice was clearly within the range of possibility," and the successful litigant cannot affirmatively demonstrate that the recesses were "imperative" under the "exigencies" of the case.

The main issue involves a determination whether any error occurred in the conduct of the trial. The corollary issue additionally involves a determination whether the error, if one exists, is prejudicial and therefore reversible.

Both points are intimately intertwined with the Judicial Conference's purpose "to promote simplicity in procedure,

fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay'' in the administration of justice. 28 U. S. C. § 331.

Both points are also intertwined with the marked increase in protracted litigation, particularly that involving patent and antitrust matters, that prompted the famed Prettyman Report on Procedure in Antitrust and Other Protracted Cases, adopted by the Judicial Conference in 1951 (13 F. R. D. 62), and ultimately resulted in the drafting of the Handbook of Recommended Procedures for The Trial of Protracted Cases, adopted by the Judicial Conference of the United States in March 1960.

Finally, both points involve the conclusiveness, under the Seventh Amendment, of fact findings made by a jury. If, on a highly questionable conclusion of error in the scheduling of trial recesses, coupled with a presumption of prejudice predicated solely on the ''possibility'' thereof and failure to demonstrate the ''imperativeness'' of the recesses, detailed findings of a jury may be set aside by an appellate court and the benefits of the jury findings denied to a successful defendant, then the protection of the Seventh Amendment is essentially and effectively dissipated on the rocks of a vague, unascertainable, undefineable, subjective test.

Chapter VI, subparagraph E(1), of the Recommended Procedures for Protracted Cases, 25 F. R. D. 351, 409, reads, in part, as follows:

> ''The Court, in consultation with counsel, should decide on a trial schedule and include in the definitive pretrial order . . . the number of days for anticipated long recesses, especially the time period between the end of plaintiff's case in chief and the beginning of defendant's case.''

The Court of Appeals focused its attention on a recess declared by the Court following the presentation of Plain-

tiff's case in chief in finding that error in the trial schedule had occurred and in presuming that that error was prejudicial.

> "The recess, which may have adversely affected the case of the plaintiff most seriously, was one of 11 days, exclusive of Saturdays and Sundays, declared at the close of court on February 25, when, for all practical purposes, the presentation of the plaintiff's evidence had been concluded. This intermission was ordered sua sponte by the trial judge and for his own accommodation."
>
> * * * * *
>
> "We recognize at the outset that in the trial of the protracted case by a jury, a plaintiff is usually under a technical disadvantage incident to the accepted order of proof. *Prolonged recesses, such as those which characterized the trial of this case, are not warranted except where the exigencies are such as to make them imperative.*"
>
> * * * * *
>
> "It can be reasonably assumed that during the adjournment the jurors returned to their usual employment and became occupied in their own affairs. After the trial resumed on March 15, the jury heard 19 days of testimony offered by the defendant without interruption. The uncertainty of memory being what it is ordinarily, it would be unreasonable to expect that under the circumstances here present, the jurors would retain a completely revivable grasp of 11 days of testimony offered by the plaintiff more than two months before the case was finally submitted to them for consideration. Absent such a grasp the jury was in no position to adequately weigh the testimony offered by the plaintiff against that offered by the defendant." (App. pp. 17-18.) (Emphasis added.)

The Court of Appeals, in spite of a request from Petitioner that enforceable, effective guidelines be declared for the benefit of future litigants, including this Petitioner, in-

volved in protracted, expensive litigation, declined to further define what the Court meant when it stated that "prolonged recesses . . . are not warranted except where the exigencies are such as to make them imperative." (App. p. 17.) What is and what is not "imperative" is highly subjective in any given factual situation and, what is more important, the test, if it can be called that, appears to be meaningless when viewed in light of the mandatory provisions of the Fifth and Seventh Amendments. If the recesses are prejudicial to the point where a litigant is denied due process and the right to an effective jury trial, it appears doubtful that the fact that the recesses were "imperative" would redeem the trial on its procedural merits. The ability of a jury to observe, recall, or remember is in no way dependent on whether the recesses declared during the course of the trial were "imperative".

In addition, the presumption of jury forgetfulness, adopted by the Court of Appeals, appears to neglect the fact of cross-examination during the defendant's presentation of its case and, more importantly, overlooks the fact of rebuttal testimony offered by the plaintiff, and extensive closing arguments to the jury by both parties. It would appear that any lengthy or protracted trial must of necessity be prejudicially erroneous to the losing party, whether or not recesses had been declared, if the time between the plaintiff's presentation of its case in chief and the ultimate submission of the case to the jury is to be the critical factor. The only logical answer would appear to be simultaneous presentation of all evidence—a practical absurdity.

The implementation of the Recommended Rules for Protracted Cases, the fair and efficient disposition of the increasing number of protracted cases, and this Court's unique position as the focal point for guidelines for all courts in the federal judicial system, call for the granting

of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

> "However, in this instance the issue concerns the construction and application of the [Federal Rules of Civil Procedure]. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." *Schlagenhauf* v. *Holder,* 379 U. S. 104, 112, 85 S. Ct. 234, 239 (1964).
>
> * * * * * *
>
> '[W]e think it clear that where the subject concerns the enforcement of the * * * rules which by law it is the duty of this court to formulate and put in force * * * it may * * * deal directly with the District Court *.* *." (*Schlagenhauf, supra,* quoting *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U. S. 701, 706.)

In addition, the precedent established by the Court of Appeals' finding of error by construction (absent any objection to the issue by either party in the court below when the recesses mentioned were scheduled or took place), and the presumptive finding that the constructive error was prejudicial, seriously affects the finality of jury findings. The Seventh Amendment states that "no facts tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Both the plaintiff *and* defendant in a civil case are entitled to the benefit of the Seventh Amendment. At the end of the case, the jury answered sixteen interrogatories, each requiring individual consideration of specific facts. The interrogatories related to five different counts and counterclaims. At least seven of the answers were favorable to the *plaintiff*. The individual interrogatories associated with each one of the five separate counts were answered consistently. It was not even alleged that any inconsistency or contradiction in the jury's answers to the special interrogatories existed.

At the time of the verdict, the jury wrote a letter to the judge. The letter pointed out that even though answers to some of the special interrogatories favored the defendant, there was definite sympathy for the plaintiff. The letter concluded:

> "In our attempt to answer your questions honestly and *without prejudice of any kind,* we feel obligated to include these opinions." (App. p. 28.)

The only evidence is that the jury knew precisely what it was doing and that it responsibly and conscientiously performed its function as trier of the facts. Notwithstanding the foregoing, and based solely on a finding of error resulting from recesses never objected to by either party, and a finding of prejudice stated by the court to be "within the range of possibility," the successful defendant-petitioner must again submit to a lengthy, time consuming, expensive, protracted civil jury trial on the same issues without even meaningful guidelines as to when or under what conditions it may expect finality in its dispute with the plaintiff. The protection of the Seventh Amendment is of little value to petitioner or to other litigants in protracted cases if an appeals court can presume away the accuracy of a jury's findings.

The cause of efficient administration of protracted civil litigation, not only for petitioner but also for all future litigants, requires the establishment of effective, ascertainable guidelines for the District Courts in view of the Third Circuit's apparent decisional conflict with the letter, spirit and intent of the Recommended Rules for The Trial of Protracted Cases.

The establishment of such guidelines will help to clarify, if not restore, the protection afforded a successful protracted case litigant under the Seventh Amendment by favorable jury findings of fact.

CONCLUSION.

The Third Circuit has held, in conflict with the letter, spirit, and intent of the Recommended Rules for The Trial of Protracted Cases adopted by the Judicial Conference, that a prolonged recess of eleven days ordered by a judge for his "own accommodation" during the course of a protracted civil jury case, presumptively denies a party (plaintiff or defendant) due process and/or an effective jury trial "except where the exigencies are such as to make them [recesses] imperative." (App. p. 17.)

The Court, having decided that recesses declared for the trial judge's own accommodation were not "imperative," and therefore constituted error, then proceeded to hold that the error would be presumed prejudicial since a trial schedule relates to the substantial rights of the parties "and prejudice was clearly within the range of possibility." (App. p. 18.) No other demonstration of prejudice was required. The action of the Third Circuit effectively nullified the jury's findings of fact expressed in answers to 16 specific interrogatories.

The future conduct of protracted civil litigation, the effective guidance of trial judges, and the rights of all litigants to the benefit of favorable jury findings, strongly support the issuance by this Court of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 15643.

CARL D. CITRON,

Appellant,

vs.

ARO CORPORATION, A FOREIGN CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued May 19, 1966

Before STALEY, *Chief Judge,* MCLAUGHLIN and SMITH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed May 11, 1967)

By SMITH, *Circuit Judge.*

This is a civil action in which the plaintiff, as assignee of the rights of one David Roth, sought damages, an accounting for profits, and an injunction. The complaint stated three separate claims for relief alleging (1) breach of a confidential relationship and the unlawful conversion

of a trade secret, the subject matter of which was a surgical instrument; (2) conspiracy to violate certain fiduciary obligations owed to the assignor by reason of an agreement; and (3) fraud in the prosecution of a patent application covering the said surgical instrument. In addition to the usual denials of the pertinent allegations of the complaint the defendant's answer contained a counterclaim based upon trade libel. The present appeal is from a judgment in favor of the defendant entered on the jury's answers to 16 special interrogatories. There is no appeal from the judgment in favor of the plaintiff on the counterclaim.

The plaintiff urges reversal of the judgment on several grounds but his main argument is that the manner in which the trial was conducted was so highly prejudicial to his case as to amount to a denial of due process. The validity of this argument must be measured against the background of the trial as a whole: the complexity of the litigation; the length of the trial; the quantity of evidence received; and, the difficulty of the task which confronted the jury.

We are convinced from our review of the voluminous record before us that the case was a difficult one for the jury not only because of the length of the trial but also because of the multiplicity and the complexities of the issues involved. The determination of these issues required the application of legal principles with which the average juror cannot be expected to be familiar. The difficulty of the task which confronted the jury is indicated by the magnitude of the record. There are reproduced in the Appendix more than 4000 pages of testimony given by 21 witnesses, and close to 200 documentary exhibits, many of them voluminous. These include both patents and prior art references offered in defense of the trade secret claim.

The actual trial of this case, exclusive of the time necessarily devoted to the hearing of motions, required 32 full days but moved forward intermittently and sporadically

for a period of three months, from January 27 to April 29, 1965, when the case was finally submitted to the jury. During this period the trial, and particularly the presentation of the plaintiff's evidence, was interrupted by periodic recesses. The first recess of five days was granted at the request of the defendant, without objection by the plaintiff, after only three days of trial. This was later followed by two intermissions, each of one day's duration.

The recess, which may have adversely affected the case of the plaintiff most seriously, was one of 11 days, exclusive of Saturdays and Sundays, declared at the close of court on February 25, when, for all practical purposes, the presentation of the plaintiff's evidence had been concluded. This intermission was ordered sua sponte by the trial judge and for his own accommodation. The trial was resumed on the morning of March 15, and thereafter continued without interruption for 19 days, during which the defendant presented its evidence and concluded its case. Thereafter the jury was in recess from April 9 to April 22; during this period several days were devoted to hearing arguments on the court's proposed jury instructions and the request for instructions by counsel. The case was finally submitted to the jury on April 29, fully two months after the close of the plaintiff's evidence.

We recognize at the outset that in the trial of the protracted case by a jury, a plaintiff is usually under a tactical disadvantage incident to the accepted order of proof. Such a disadvantage may be unavoidable but it is considerably minimized if the trial is moved along with reasonable continuity so as to permit the orderly and intelligible presentation of testimony. Prolonged recesses, such as those which characterized the trial of this case, are not warranted except where the exigencies are such as to make them imperative.

The presentation of the plaintiff's evidence, interrupted

by eight days of intermission, required but eleven days. At the close of this evidence on February 25, the trial was adjourned until March 15. It can be reasonably assumed that during the adjournment the jurors returned to their usual employment and became occupied in their own affairs. After the trial resumed on March 15, the jury heard 19 days of testimony offered by the defendant without interruption. The uncertainty of memory being what it is ordinarily, it would be unreasonable to expect that under the circumstances here present the jurors would retain a completely revivable grasp of eleven days of testimony offered by the plaintiff more than two months before the case was finally submitted to them for consideration. Absent such a grasp the jury was in no position to adequately weigh the testimony offered by the plaintiff against that offered by the defendant. This the jurors were required to do if they were to arrive at a fair and just verdict.

We are persuaded by our review of the record as a whole that the manner in which the trial of this case was conducted was erroneous. However, the question for decision is whether the error may be disregarded as harmless in the absence of an affirmative showing of prejudice. We think not. We believe that the trial was conducted in a manner which in its ultimate effect was distinctly favorable to the defendant and decidedly unfavorable to the plaintiff.

Since the error was one related to the substantial rights of the plaintiff, and prejudice was clearly within the range of possibility, a demonstration of prejudice was not required. *Snyder* v. *Lehigh Valley Railroad Company,* 245 F. 2d 112, 115 (3rd Cir. 1957). It is the settled rule that an error "which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless* v. *United States,* 298 U. S. 342, 347, 348 (1936) and the cases therein cited; *Sears* v. *Southern Pacific Company,*

313 F. 2d 498, 503 (9th Cir. 1963). It did not so appear in the instant case.

It must be conceded, as the defendant argues, that the plaintiff interposed no objection to the prolonged recesses. The plaintiff's failure to object, although not completely excusable, is understandable. On the second day of trial the judge, referring to a contemplated trip, announced:

> "I have had this planned for many months and I am not going to forget it for this case or any other case . . . I am leaving this city on February 25th and I will not be back until March 15th, so you can plan your affairs accordingly."

To require an objection after such an emphatic announcement would seem to place an undue emphasis on form.

However, the absence of timely objection does not necessarily preclude the consideration of error which may have resulted in a miscarriage of justice. *Pritchard* v. *Liggett & Myers Tobacco Company*, 350 F. 2d 479, 486 (3rd Cir. 1965) cert. den. 382 U. S. 987. We believe that the error in this case adversely affected the right of the plaintiff to a fair and impartial trial.

The judgment of the court below will be reversed and the action will be remanded with a direction that a new trial be ordered.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

CARL D. CITRON,
Plaintiff,
vs.
ARO CORPORATION, a Foreign Corporation,
Defendant.

Civil Action No. 63-623.

OPINION.

WALLACE S. GOURLEY, *Chief Judge*:

This civil jury proceeding, based on diversity of citizenship, related to the rights to what is known as the Hall Air Drill, a high-speed pneumatic instrument used in oral and general surgery.

Plaintiff is the assignee of the rights of David Roth and claims he was entitled to relief under the following separate and distinct claims:

1. COUNT I—That certain disclosures concerning a new surgical instrument, the Hall Air Drill, were made in confidence to the defendant by David Roth and Dr. Robert Hall, and that defendant appropriated these disclosures which constituted trade secrets for its own use.

2. COUNT II—That Roth and Hall were engaged in a joint venture with respect to the development and

distribution of the new instrument; that, as joint adventurers, Roth and Hall owed fiduciary duties to each other; that Aro was advised of the joint venture, and that notwithstanding such knowledge defendant knowingly and intentionally joined with Hall in breaching certain fiduciary duties and obligations which Hall owed to Roth.

3. COUNT III—That defendant caused one of its employees to file a patent application covering the new instrument although it knew, or should have known, that its employee was not the inventor thereof.

Defendant filed a Counterclaim that alleged plaintiff disseminated press releases to its customers and potential customers which contained false statements and as a result defendant's property rights in the Hall Air Drill were disparaged.

The case was most intricate and involved, and as a result thereof the action was supervised and administered by this member of the Court from the date of filing to jury verdict. Many weeks were spent in the disposition of preliminary motions, discovery processes, innumerable pretrials and conferences with counsel.[1]

In the administration of the case the Court applied the provisions of the Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States in March, 1960 (25 F. R. D. 351), and extended every possible effort to ease counsel's heavy burden.

1. The record reveals 14 motions and petitions filed by plaintiff; 18 motions and petitions filed by defendant; 84 Memorandum Opinions and Orders entered by the Court; 233 exhibits offered by plaintiff; 105 exhibits offered by defendant and 4 court exhibits. There were 12 hearings, 3 of which were pretrial. The record also reveals that the jury asked 11 questions which are attached and incorporated into the record.

The jury returned answers to sixteen special interrogatories and according to said answers the Court entered a verdict in favor of defendant on all three Counts of the Complaint and in favor of plaintiff on the Counterclaim.

The matters before the Court relate to Plaintiff's Motion for Judgment N. O. V. and/or Motion for New Trial in which counsel for plaintiff set forth 41 Assignments of Error with 22 sub-assignments under Assignment of Error 38.

After a most thorough, complete and meticulous review of the entire record, briefs and oral arguments of counsel and the applicable law, it is the considered judgment of the Court that the Motion for Judgment N. O. V. and in the alternative for a New Trial should in each instance be denied.

MOTION FOR JUDGMENT N. O. V.

The Court is not free to reweigh the evidence and set aside the findings of the jury because the jury could have drawn different inferences or conclusions, or because it is believed that other results are more reasonable. *Jamison* v. *DiNardo, Inc.*, 195 F. Supp. 99 (W. D. Pa., 1961), aff'd. 302 F. 2d 27 (3 Cir. 1962).

After viewing the evidence and all inferences reasonably to be drawn therefrom, it is my considered judgment that under all the evidence and law substantial bases exist to justify the findings and conclusions of the jury.

The Motion for Judgment N. O. V. is denied.

MOTION FOR NEW TRIAL.

The motion for New Trial and the reasons submitted in support thereof are without reason, merit or foundation, and no useful purpose could be gained by a review or discussion of each and every assignment of error.

However, I would like to comment briefly on some of plaintiff's most pointed assignments of error.

Plaintiff alleges that he was prejudiced by the withdrawal of the question of damages from the jury during the trial. The full breadth of the conflict over the items of damage and the complicated and intricate accounting problems raised by this conflict was manifest only after the trial began and the Court discussed settlement possibilities with the parties. Due to the already complex legal and factual issues bearing on liability, the Court did not want to confuse the jury any more than necessary by the addition of a maize of accounting figures and calculations. In light of this consideration I do not feel that it was an abuse of discretion to separate the trial of liability from damages. *Moss* v. *Associated Transport, Inc.*, 344 F. 2d 23 (6 Cir., 1965). Moreover, plaintiff neved lodged any objection to this procedure until subsequent to the jury verdict.

In connection with the settlement negotiations plaintiff claims that Dr. Hall was present and that he was not even a party to the action. Plaintiff then goes on to say in his brief in support of Motion for Judgment N. O. V. and/or New Trial that this indicates that the judge was very impressed with Dr. Hall and did not want to do anything to affect him adversely. Plaintiff's memory seems all too short in this instance. Dr. Hall was invited to the settlement negotiations because these negotiations directly involved the proposed settlement of a companion case (Civil Action No. 63-1087) brought by plaintiff's company under the Anti-trust Laws which names Dr. Hall as a defendant. In fact counsel for both parties advised the Court that the settlement negotiations were related to both suits. Because of this and not any "unusual admiration or respect" for Dr. Hall was he required to be present. Dr.

Hall was not known to the Court until after the proceeding was called for trial.

In connection with any recesses or delays in the trial of the case, no objection was offered by counsel for plaintiff at any time and, in fact, all counsel agreed that many of the recesses were welcome due to the pressing needs of their general practices.

The complaint which plaintiff's counsel makes relative to the Charge of the Court that he was not treated fairly, was confused and did not have an opportunity to protect the record by registering his exceptions is without merit and as the record will show there is no basis or foundation for this unjustified assertion.

The Court followed the suggestions and provisions of the Handbook of Recommended Procedures for the Trial of Protracted Cases with regard to the preparation and delivery of the charge to the jury. 25 F. R. D. 351. The Court spent five days with counsel and seven days apart from counsel in the preparation, review and evaluation of the applicable law. Moreover the Court afforded counsel full opportunity to be heard on each of their requests for charge, made a firm ruling and noted an exception relative to the requests which the Court did not feel proper. In light of the exhaustive hearings held on the formulation of the Charge originally prepared by the Court and submitted to counsel, the Court rewrote the Charge on three different occasions.

Due to the closing arguments of counsel it was necessary to submit oral instructions which were not a part of the instructions delivered to the jury orally and in writing. The record will reveal that counsel were given an opportunity to object to each and every part of the Charge.

In connection with the unjustified assertion that the Court talked with Dr. Hall, or any other doctor to the prejudice

of the plaintiff, during the trial, I first presented the thought which I had in mind relative to any such conversation to counsel for each party, which the record will reflect, before any conversation or discussion was had in any way whatsoever with any person.

Plaintiff also claims that the Court erred in allowing the cross-examination of Roth with respect to the abandonment and/or waiver of his rights in the Hall Air Drill, and also in charging the jury on these defenses since they were not raised in the pleadings or Pretrial Statement of Defendant. A review of Defendant's Pretrial Narrative Statement filed November 4, 1964, indicates that defendant recited facts at Page 26 which indicate that Roth waived or abandoned his rights, if any. Therefore, it was proper to allow evidence into the record pertaining to these defenses and it was the Court's duty to submit an instruction thereon. *Franklin Life Insurance Co.* v. *Bieniek,* 312 F. 2d 365 (3 Cir., 1962).

A review of the record will reveal that the trial was administered impartially, without bias or prejudice on the part of the trial judge to either party.

The Motion for New Trial is denied.

An appropriate Order is entered.

ORDER.

AND NOW, this 28th day of June, 1965, Plaintiff's Motion for Judgment N. O. V. and/or New Trial will be, and hereby is, denied.

/s/ WALLACE S. GOURLEY, CDJ,
Chief Judge.

APPENDIX C.

SPECIAL VERDICT AS TO COUNT I.

Question	*Answer*
1. Did Roth and Hall who owned Surgi-Drill, Inc., disclose new, novel, concrete and secret information to Aro?	No
2. Were these disclosures made in confidence to Aro?	No
3. If the disclosures were made in confidence to Aro, did Aro breach this relationship of confidence by using the disclosures for its own benefit?	No
4. If property rights existed, did Roth abandon or give up property rights in the air drill project?	Yes
If answer is "yes", state	
(a) Abandoned	Yes
(b) Given up	Yes
5. If property rights existed, did Surgi-Drill, Inc., abandon or give up its property rights in the air drill prior to November 28, 1962, the date of the separation agreement between Hall and Roth?	No

SPECIAL VERDICT AS TO COUNT II.

Question	*Answer*
1. Did the agreement of November 28, 1962, create a joint venture between Roth and Hall in the Hall Air Drill?	Yes
2. Did Hall breach a fiduciary duty to Roth?	No

3. Did Aro know or should Aro have known of the relationship between Hall and Roth, and then combine and conspire with Hall to breach Halls fiduciary duties to Roth?..... No

SPECIAL VERDICT AS TO COUNT III.

Question	*Answer*
1. Did Roth and Hall disclose new, novel and concrete information to Aro that was the invention claimed in the DeGroff patent?.....	No.
2. Was the action of Aro in causing DeGroff to file his patent application a fraud on the United States Patent Office and on Roth?.....	No

SPECIAL VERDICT AS TO ASSIGNMENT.

Question	*Answer*
Was the assignment from Roth to Carl D. Citron champertous?.....	No

SPECIAL VERDICT AS TO COUNTERCLAIM.

Question	*Answer*
1. Did Carl D. Citron publish factual material which was untrue or opinions which he did not honestly believe to be valid?.....	No
2. Should Carl D. Citron as a reasonable man seen that this information would be a factor in influencing potential customers not to buy the Hall Air Drill from Aro?.....	No
3. Did Aro suffer financial loss as a result of the publication of this material?.....	No
4. Was the publication malicious?.....	No
5. Was the publication made without privilege?..	No

APPENDIX. D.

LETTER FROM JURY.

May 4, 1965.

To the Honorable Judge Gourley:

This jury voted unanimously to add this supplement to the verdicts the court asked us to decide.

We have sincerely attempted to evaluate the evidence and testimony and arrive at honest answers. Even though these answers favor the Aro Corporation, everyone agreed that this was not a simple case of black and white, of one side being good and the other evil, of 100% right versus 100% wrong. It is our considered opinion, that though the Plaintiff failed to prove his case, according to the law as outlined in His Honor's charge to this jury, some of the Defendant's actions and some of Dr. Hall's deeds seem beyond the scope of Christian ethics. We can't accept this under the heading of "Shrewd Business Dealings."

We also feel it was unfortunate that David Roth severed his business connections with Dr. Hall. Together with the Aro Corporation it is likely there would have been a profitable business venture. If, as partners, they felt that Aro had taken advantage of them, a suit by Roth and Hall against Aro might seem more comprehensible.

If this message is out of order we beg the court's pardon, but in our attempt to answer your questions honestly and without prejudice of any kind, we feel obliged to include these opinions.

Sincerely,

THE JURY,

/s/ JAMES E. COOPER, *Foreman*,

/s/ NORMA VITRIL, *Secretary*.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

CARL D. CITRON
vs.
ARO CORPORATION, a foreign corporation } Civil Action No. 63-623

ORDER.

In this civil proceeding the complaint was filed June 24, 1963, and the action was assigned to this member of the Court on the basis of being an involved and protracted proceeding.

It is the intention of the Court to invoke the procedure applied in protracted civil actions as outlined in the Handbook of Recommended Procedures for the Trial of Protracted Cases which was adopted by the Judicial Conference of the United States and which has the full force and effect of law since March of 1960. The immediate reference to this Handbook can be found in 25 F. R. D. 351.

Counsel for the plaintiff is directed to communicate with the Court as soon as an appearance is entered on behalf of the defendant in order that the procedures which will be permitted can be applied to the preparation and trial of this action.

All matters are stayed as far as discovery is concerned.
Dated: July 30, 1963.

/s/ WALLACE A. GOURLEY,
Chief Judge.

cc: Reed, Smith, Shaw & McClay, Esqs.

APPENDIX F.

PRE-TRIAL NOTICE OF RECESSES.

Pre-Trial Proceedings of
12/14/64

No objection to trial schedule
(Tr. 13 *et seq.*)

The Court: Well, this case we have is going to take longer than that. Now, I am giving you fellows information nobody else knows yet. I am on various national committees that the Chief Justice has placed me on, and I do a lot of traveling and lecturing. I have to be in New Orleans on official business on February 4, February 5, February 6; and February 7. I have non-jury trials set up starting February 8, but I can pass non-jury trials because my non-jury docket is current. I could start this case on the 25th of January. That would give you another week, and then I would recess it on Wednesday, February 3rd, to Monday, February 8th, and then we would have the 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, and 19th of February. Washington's birthday doesn't mean anything to me. I like George, but as far as work is concerned—

Mr. Maxwell: I didn't know him.

The Court: As far as the 22nd is concerned, I will work. The 23rd, 24th, 25th, 26th and then I have to go out of the country on official business for two weeks on February 26th, so that would give you the equivalent of eighteen to twenty trial days. Can it be tried in four weeks?

Mr. Ittel: Yes, your Honor. I think so.

The Court: What do you think?

Mr. Maxwell: I would think so, your Honor. It is going to depend on the plaintiff's case.

The Court: Well, with the intricacies that you have in this case and the number of people that you have involved, I have several of these on my list, and I am trying to spell out for you as well as I can the problems that confront us. . . .

The Court: Well, would it inconvenience you if we started on the 25th rather than the 18th, and try to help those that are going to succeed us some day?

Mr. Ittel: Not to the best of my knowledge right now, your Honor.

The Court: Would it inconvenience you any?

Mr. Maxwell: I don't think so, your Honor. I have scheduled all these people, you know—

The Court: I know that.

Mr. Maxwell: —but then my scheduling had to be flexible anyway because I didn't come first.

The Court: Well, I will change it to the 25th of January. . . .

SUPREME COURT, U. S.

FILED

OCT 12 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 615

ARO CORPORATION,

Petitioner,

v.

CARL D. CITRON,

Respondent.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE PETITION FOR A WRIT OF CERTIORARI

The Petition prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing the judgment of the District Court and remanding the cause for a new trial.[1]

The "Statement", contained in the Petition, states (Pet. 6) "On appeal the Court [Court of Appeals] reversed the judgment resulting from the jury verdict solely on the ground that the scheduling of trial recesses in the protracted litigation presumptively prejudiced plaintiff's right to due process and to effective trial by jury, . . .". This entirely ignores that portion

1. *Citron v. Aro Corp.*, 377 F.2d 750 (3d Cir. 1967).

of the Opinion of the Court of Appeals which reads as follows (Pet. 18):

> "We are persuaded by *our review of the record as a whole* that the manner in which the trial of this case was conducted was erroneous. However, the question for decision is whether the error may be disregarded as harmless in the absence of an affirmative showing of prejudice. We think not. We believe that the trial was conducted in a manner which in its ultimate effect was distinctly favorable to the defendant and decidedly unfavorable to the plaintiff." 377 F.2d at 753; emphasis added.

The "Statement" also neglects to inform the Court that plaintiff-respondent, when filing his Motion for a New Trial with the District Court, in addition to the points relating to the "prejudice resulting from various trial recesses," also assigned some 59 additional reasons in support of his Motion.[2] Substantially all of the reasons set forth in the Motion were argued in the brief and oral argument to the Court of Appeals.[3]

The "Statement" also states that petitioner-defendant "sought a rehearing from the Court of Appeals asking for a declaration of guidelines for the conduct of further protracted litigation — including the retrial of the instant case — . . .". (Pet. 7) This, of course, was rightfully denied for courts do not give advisory opinions.

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2. See Joint Appendix, Vol. 11, pp. 4530a-45a. The reasons relating to the trial recesses are found in Paragraphs 38(a)-(c) of the Motion. Joint Appendix, Vol. 11, pp. 4539a-40a. The other reasons are found in Paragraphs 1-37, 38(d)-(v) and 39-41 of the Motion.

3. See Brief of Appellant in the Court of Appeals which Brief was certified as a supplement to the Record, previously certified to the Supreme Court, at the request of plaintiff-respondent.

II.

THE ORDER OF THE COURT OF APPEALS

The Order of the Court of Appeals sought to be reviewed is as follows:

"JUDGMENT

"This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of defendant, filed May 5, 1965, be, and the same is hereby reversed, with costs, and the cause remanded with a direction that a new trial be ordered."

The Supreme Court of the United States has consistently held, since Courts of Appeals were established, that certiorari will not issue to review a judgment of those courts reversing a judgment of the lower court and remanding the cause for new trial, such judgments not being final decisions. *Chicago & N.W.R. Co. v. Osborne,* 146 U.S. 355 (1892).

We recognize that the Court does have authority and has on occasion granted certiorari on interlocutory orders. Our diligent research has failed to disclose any instance where it was granted except where the issue involved was fundamental to further conduct of the case. *Land v. Dollar,* 330 U.S. 731 (1947). It appears abundantly clear that the ordering of a new trial for prejudicial errors in the trial of a case is not such an issue.

Petitioner-defendant does not question the jurisdiction of the Court of Appeals to enter the judgment complained of nor does it contend that there is any issue involved the decision of which is essential to the proper retrial of the case. Nor does it contend that an injustice is done and hence the Court of Appeals abused its discretion in entering the judgment. Its sole complaint is its dislike for the judgment ordering a retrial of this case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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